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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 60

ABRAM FLAXER, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinions issued in connection with the original decision below (R. 96-114) are reported at 235 F. 2d 821. The opinions issued on the second decision (R. 116-120) following remand of the case by this Court for reconsideration (R. 115) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals (R. 121) was entered on April 3, 1958. The petition for certiorari was filed on April 29, 1958, and certiorari was granted on June 9, 1958 (R. 122). The jurisdiction of the Court rests on 28 U.S. Code, sec. 1254 (1).

STATUTES AND RESOLUTIONS INVOLVED

Rev. Stat., Sec. 102, as amended, 2 U.S.C., sec. 192:

> Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

S. Res. 366, 81st Cong., 2d Sess. (1950) (96 Cong. Rec. 16862) provides in part:

> *Resolved,* That the Committee on the Judiciary, or any duly authorized subcommittee thereof is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and

possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence.

SEC. 2. The committee, or any duly authorized subcommittee thereof, is authorized to sit and act at such places and times during the sessions, recesses, and adjourned periods of the Senate, to hold such hearings, to require by subpoenas or otherwise the attendance of such witnesses and the production of such books, papers, and documents, to administer such oaths, to take such testimony, to procure such printing and binding, and, within the amount appropriated therefor, to make such expenditures as it deems advisable. * * * Subpoenas shall be issued by the chairman of the committee or the subcommittee, and may be served by any person designated by such chairman.

A majority of the members of the committee, or duly authorized subcommittee thereof, shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the committee, or by such subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony.

Senate Resolution 180, 81st Cong., 2d Sess. (96 Cong. Rec. 1284) amended subsection (3) of Rule XXV of the Standing Rules of the Senate, to read as follows:

3(a) Except as provided in paragraph (b) of this subsection, each standing committee, and each subcommittee of any such committee, is authorized to fix the number of its members (but not less than one third of its entire membership) who shall constitute a quorum thereof for the transaction of

such business as may be considered by said committee subject to the provisions of Section 133(d) of the Legislative Reorganization Act of 1946.

(b) Each standing committee, and each subcommittee of any such committee, is authorized to fix a lesser number than one third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony.

The new matter introduced by Resolution 180 is subparagraph (b). Unless changed, the rules of one session of the Senate carry over into the next (R. 35).

QUESTIONS PRESENTED

1. Whether the conviction of a union president for contempt of Congress for refusing to produce to the Senate Internal Security Subcommittee the names and addresses of the 35,000 members of his labor union may be sustained, there being no evidence of the subject under inquiry, of the pertinency of the documents demanded, of the purpose for which the subcommittee desired the names, or of the use to which the names would be put, and no showing of a legislative purpose for the demand.

2. Whether it was permissible for the court below to find pertinency and a legislative purpose in the absence of evidence on the subject, by conjecturing that the Subcommittee desired the names of the Union's members in order to check them "against a list of subversives to determine the extent of infiltration into the union."

3. Whether the purpose conjectured by the court below is a valid legislative purpose and consistent with the Constitution.

4. Whether the authority of the Internal Security Subcommittee is so vague that it may not constitutionally support the use of compulsory process.

5. Whether the conviction was invalid because petitioner objected at the Subcommittee hearing that the demanded documents were irrelevant and served no legislative purpose, and yet the Subcommittee failed to state the subject under inquiry, the pertinency of the documents, or the legislative purpose.

6. Whether under the Senate rules and the Senate resolution establishing the Subcommittee, one member of the Subcommittee constituted a quorum for the purpose of ruling on objections to the validity of a subpoena duces tecum to produce the names and addresses of 35,000 members of a labor union.

7. Whether petitioner was guilty of a wilful default for the failure to produce the membership lists at a hearing at the conclusion of which he was directed to produce the documents not then and there, but within ten days.

STATEMENT OF THE CASE

The petitioner was convicted on both counts of a two-count indictment (R. 2-3) charging him with violating 2 U.S. Code, sec. 192, by refusing to produce certain records before the Subcommittee on Internal Security of the Senate Committee on the Judiciary.

The Subcommittee Proceedings

On September 19, 1951, petitioner, then national president of a labor union, the United Public Workers of America (R. 39), was served with a subpoena duces tecum of the Subcommittee on Internal Security of

the Senate Committee on the Judiciary (R. 37, 64). The subpoena directed production on October 5, 1951 of records of the Union[1] showing (1) certain financial data, (2) the names and addresses of all Union members employed by the federal government, and (3) the names and addresses of all Union members employed by any state, county or municipal government. The subpoena gave no indication of the subject matter of the inquiry. (R. 63-4.)

The Union had approximately 35,000 members, and since these were all government employees, compliance with the subpoena would have required petitioner to produce, in addition to financial information, the names and addresses of the Union's entire membership. Five percent of the members were federal employees, most of whom worked for the Bureau of Engraving, the Post Office and the Veterans Administration. The rest of the Union's members were employees of state, county and municipal governments, mostly the last. (R. 43-4, 53.)

The subpoena had been prepared and apparently sent to Senator McCarran, then Subcommittee chairman, by two members of the Subcommittee staff, who were acting, so far as appears, without advance authorization or approval of the Subcommittee (R. 53-61).

Petitioner appeared before the Subcommittee on October 5, 1951. Only one member of the Subcommittee, Senator Watkins, was present. At the outset of the hearing, petitioner objected to the absence of a

[1] Erroneously named in the subpoena as "United Professional Workers of America" (R. 63, 42).

quorum. Senator Watkins overruled his objection. (R. 38-9.)

At the hearing, petitioner produced, as demanded by the subpoena, Union records showing the amount, source and place of deposit of the Union's funds and the organizations to which the Union had contributed during the preceding twelve months (R. 39-41). Petitioner was asked various questions about the Union, all of which he answered, including questions on its methods of operation, the number of its members, and where the members were employed (R. 43-46).

The petitioner objected, however, to those portions of the subpoena which demanded the production of the names and addresses of the Union's members. He argued that these demands invaded "the rights of unions to the privacy of their membership records" and that experience taught that invasions of this privacy served "to compile blacklists for the sole purpose of destroying unions" (R. 41). He added (R. 42):

> "Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. A request such as the present constitutes a wholesale invasion of such privacy and the 'right to be let alone' which is protected by the fourth amendment. Every trade-union member imposes a special trust in his union officers to protect and preserve that right. Therefore, to submit to the request in this subpoena would be a violation of the trust imposed in me by my membership and a betrayal of the entire trade-union movement in this country. I have no doubt that not a single union president would find it possible to comply with such a request.

> "I am confident that the members of this committee, after considering my views and after a study of the full implications of the request made in this subpoena, will realize its conflict with the basic union tradition of this country now incorporated into Federal law and withdraw the demand for membership lists."

Petitioner said that he did not have the list of Union members with him because he considered the demand for the list to be improper. Senator Watkins then stated: "You are directed by the committee to produce those records according to the terms of the subpena." (R. 47.)

Petitioner immediately asked for reconsideration, urging that the Subcommittee was violating a national policy, manifested in federal legislation, against an employer's asking the names of union members (R. 47-8). Senator Watkins replied: "I do not think there is any law or any court holding that the United States itself cannot find out the names of a union and the people who belong to it that are in its employ" (R. 48).

In reply to a question by Richard Arens, the Subcommittee's counsel, petitioner said that the information called for could be compiled in a week (R. 49). The following then occurred (R. 49-50):

> "Mr. Arens. I respectfully suggest to the chairman that the witness be ordered to produce the information and transmit it to the subcommittee in 10 days' time.
>
> Senator Watkins. Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date. . . .

Mr. Flaxer. I would like to suggest to the committee to reconsider that. I think you ought to consider it in the light of the facts that organized labor in America will recognize in this a break in the wall that they have built up over half a century against the initiation of blacklists. I don't think that these lists can be looked upon in any other light than as blacklists.

* * * *

Senator Watkins. May I direct your attention to the fact that this is an executive session and the records are not public here unless the order of the committee is to make them public. But at least for the present the records are to be delivered to the committee in executive session.

Mr. Flaxer. Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public.

Senator Watkins. I am not promising you they would not be made public, because I do not think the Government has to make such a promise to get the information.

Mr. Flaxer. I think, with all due respect to the committee, you are infringing here on an area which just crosses the boundaries of individual rights as well as trade-union rights far beyond the contemplation of any—

Senator Watkins. Whatever your argument is, that is the order now . . .

* * * *

Mr. Arens. The information is available to you?

Mr. Flaxer. Yes.

* * * *

Mr. Arens. Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

Mr. Flaxer. I will have to take that under consideration.

> Senator Watkins. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them."

Petitioner did not supply the membership lists within the ten day period (R. 71).

At no time during the hearing did the Subcommittee state the subject of the inquiry, the purpose for which the subpoenaed membership lists was desired, or what use would or could be made of the lists by the Subcommittee.

The Court Proceedings

Petitioner was indicted on two counts. The first count charged that on October 5, 1951 (the date of the Subcommittee hearing) he had wilfully refused to produce the names and addresses of all Union members employed by the federal government. The second count charged that on the same date he had wilfully refused to produce the names and addresses of all Union members employed by any state, county or municipal government. (R. 2-3.)

At the trial, the government introduced the subpoena (R. 63-4), the transcript of the Subcommittee hearing (R. 38-50, 65-70), and testimony of Richard Arens, counsel for the Subcommittee (R. 32, 62). Arens testified that the Subcommittee had information that petitioner, the Union's secretary-treasurer, its former negotiations director, and "certain" members of its executive board were members of the Communist Party (R. 51-3). Neither Arens nor any other witness gave any testimony as to what was the subject under inquiry or the pertinency of the Union's membership list to any subject. Nor is there any evidence in the

record of why the Subcommittee wished the names and addresses of the 35,000 union members or what use it intended to make of that information.

The trial court denied a motion for judgment of acquittal (R. 14-20). She instructed the jury as a matter of law that the Subcommittee was authorized to obtain from the petitioner the documents demanded by the subpoena, that the documents "were pertinent to the study and investigation that the subcommittee was making," and that "there was a quorum of the committee " (R. 89). She also instructed the jury, with the acquiescence of both parties (R. 79), that the question was whether there was a wilful default on October 5, 1951, when petitioner appeared before the Subcommittee, and that if he did not wilfully default at that time, the verdict should be not guilty even though the jury might believe that at some other time he did wilfully default (R. 91). Petitioner was convicted on both counts and sentenced to imprisonment for two months and a fine of $1,000.00 (R. 20-1).

The appeal was first heard below by a regular three-judge panel of the Court of Appeals, composed of Chief Judge Edgerton and Circuit Judges Miller and Fahy. Two members of this panel, Chief Judge Edgerton and Judge Fahy, were eventually to vote to reverse the conviction. However, before the panel had announced a decision, the Court of Appeals on its own motion ordered reargument before the court in banc. The in banc court affirmed by a vote of four to three (R. 96-114).[2]

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[2] Judges Prettyman, Miller, Washington and Danaher composed the majority. Chief Judge Edgerton and Judges Bazelon and Fahy dissented. Judges Bastian and Burger did not participate.

The majority of the Court of Appeals, in an opinion by Circuit Judge Miller, held that the Subcommittee's inquiry was justified under the third clause of its enabling resolution, authorizing it to study and investigate the "extent, nature and effects of subversive activities in the United States . . . including but not limited to espionage, sabotage and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world communist movement or any other movement seeking to overthrow the Government of the United States by force or violence." It ruled that against the background of this provision and anti-Communist legislation "the pertinency of the membership list demanded by the subpoena is at once apparent . . . . The names could be used to check against a list of subversives to determine the extent of infiltration into the union, a matter clearly pertinent under the Resolution, particularly since this is a Government employees' union, even though the names of state and local members are included." (R. 103-4.)

On petition for certiorari, this Court vacated the judgment below without hearing argument, and remanded the case for consideration in the light of *Watkins* v. *United States*, 354 U.S. 178 (R. 115). See *Flaxer* v. *United States*, 354 U.S. 929.

On the remand, the court below reaffirmed the conviction by a vote of 4-3 (R. 120-1).

SUMMARY OF ARGUMENT

I

A. A conviction for contempt of a congressional committee may be sustained only if (1) the questions asked or documents subpoenaed are pertinent to the matter

under inquiry by the committee conducting the investigation, (2) the inquiry serves a valid legislative purpose which the witness' recalcitrance has frustrated, and (3) the congressional need for the particular information outweighs the witness' right of privacy. These essential elements may not be presumed or conjectured. They must be proved by the prosecution.

In the present case the record does not indicate the subject under inquiry. Still less does it show the pertinency of the Union membership list to the unidentified subject under inquiry. Nor was there any evidence which would indicate the Subcommittee's need for the list or the intended use of the list.

The transcript of the hearing contains nothing which indicates these matters. The only other evidence introduced at the trial was the testimony of counsel for the Subcommittee that the Subcommittee had in its files information that some of the Union's officers and executive board members were members of the Communist Party. This without more does not demonstrate the essential elements of the case.

Since there was no evidence of the subject under inquiry, pertinency or legislative purpose, a judgment of acquittal should have been entered below.

B. The indictment made two counts out of a single subpoena which demanded not only the names and addresses of Union members employed by the federal government, but also the "names and addresses of all members who are employed by state, county or municipal governments". In so far as the subpoena demanded the names and addresses of employees of state and local governments, it was at least prima facie beyond the jurisdiction of the Subcommittee and of Con-

gress itself. The control of state and local government personnel is within the reserved power of the states. This was not a field within which Congress could legislate, and therefore the inquiry was ultra vires. Even if one could conceive circumstances in which it would be of legitimate federal concern to ascertain the union affiliations of certain state and local government employees, no such circumstances were shown here.

Since the demand for the names of Union members who were employed by state, county or municipal governments was invalid, the conviction on both counts must fall, even if the demand for the names of Union members who were federal employees were valid, since a conviction cannot stand for disobedience of a partially invalid subpoena.

C. In upholding the conviction, the court below departed from all standard principles governing prosecutions for contempt of Congress. In the face of a record which was barren of evidence as to the subject under inquiry, the pertinency of the membership list, and legislative purpose, the court conjectured these necessary elements. Its conjectures were not only unfounded, but were also unconstitutional bases for the Subcommittee's inquiry.

The first opinion of the court held that the membership list was pertinent to the third clause of the Subcommittee's charter because the "names could be used to check against a list of subversives to determine the extent of infiltration into the union." There was, however, no evidence that the subject of the inquiry was infiltration into the Union, or that the purpose of the demand was to check the names of Union members

against a master list of "subversives", or that the Subcommittee had such a master list, or what legislative use would be made of the list as checked-off. It is not a legislative function for the Congress to occupy itself with compiling political dossiers of individuals and to maintain lists of "subversives." This demand for a wholesale list of names in the absence of any showing of a legitimate legislative purpose was a violation of the First, Fourth and Fifth Amendments.

The prevailing opinion on the remand did not refer specifically to the theory originally advanced by the majority below, nor did it advance any new theory of the subject of the inquiry or the pertinency of the membership list. Yet it seems to have switched from the third clause of the Subcommittee's charter to the first two clauses, as authorizing the inquiry into an unidentified subject. The opinion ruled, erroneously, that the petitioner knew what the unidentified subject was. Even if petitioner had had such knowledge, this would not have relieved the court below of its obligation to determine and state what that subject was, whether the membership list was pertinent to that subject, and whether the demand for the list served a legitimate legislative purpose.

II

Watkins held as a requirement of due process that a witness before a congressional committee is entitled to have knowledge of the subject under inquiry and the pertinency of any questions to that subject. In the present case there was no statement at the hearing as to the subject under inquiry or the pertinency of the membership list.

The prevailing opinion below on remand avoided this problem by holding that petitioner knew the subject of the inquiry, since he answered some of the Subcommittee's questions and produced without objection financial records of his Union. This has no semblance of logic. Petitioner's answering of some questions and production of some records did not in any way reveal knowledge of the subject under inquiry, the pertinency of withheld records, or what legislative purpose could be served by the Subcommittee's demands.

The court below also held that petitioner was not entitled to an explanation of the pertinency of the membership list since he had not, according to the court, objected on the ground of lack of pertinency. In fact petitioner had stated at the hearing that the demand for the membership list was a wholesale invasion of privacy, that it was being demanded for the purpose of compiling a blacklist, that it was an "improper command," and that the records would not serve any good purpose and were "wholly irrelevant." He was also cut off in the middle of an objection and told that the demand stood no matter what his objections were. Petitioner accordingly did in fact challenge the pertinency and legislative purpose of the Subcommittee's demand for the membership list.

III

Watkins held that a witness cannot be adjudged guilty of contempt for refusing to answer questions of a congressional investigating committee chartered by a vague resolution. The resolution here involved is in three clauses. The original opinion of the court below justified the demand under the language of the

third clause. Moreover, on this record, it is impossible to tell which clause the Subcommittee was acting under. It follows, therefore, that the subpoena is vulnerable if any one of the authorizations to which it might relate is insufficient to support it.

Although all three clauses seem of dubious definiteness, the third clause is most obviously vague. Its key term, "subversive activities," is as nebulous as the language employed in the charter of the Un-American Activities Committee, which *Watkins* held was too vague to support a conviction of contempt.

IV

A single member of the seven man Subcommittee presided at the hearing and overruled petitioner's objections to the production of the Union membership list and to the absence of a quorum. Under the Senate rules and the Subcommittee's enabling resolution, one Senator was not a quorum for the purpose of ruling on petitioner's objections to the subpoena. Hence petitioner's objections were never overruled by a competent tribunal, and he cannot be held guilty of contempt.

The Senate rules and the Subcommittee's charter permit one Senator to be a quorum "for the purpose of taking sworn testimony," but a majority is necessary for the "transaction of business." The authorization to take "sworn testimony" by its terms excludes authority to deal with documents. Furthermore, the legislative history of the Senate Rule shows that the exception for smaller testimonial quorums was intended only for the narrow purpose of enabling perjury prosecutions for false testimony given before less than an ordinary quorum. The resolution was not in-

tended to authorize a one-man subcommittee to rule on objections to the production of documents.

V

At the hearing, the petitioner was told that he need not produce the membership list on that date but should produce it within ten days. The validity of this new order and whether or not the petitioner was in contempt for a failure to comply with it did not come within the scope of the issues raised by the indictment or considered at the trial, and petitioner's conviction must rest on the theory that the contempt was complete at the hearing.

Petitioner could not be found guilty of a wilful default of the subpoena, unless, after consideration of his objections to the validity of the subpoena, he was directed to produce the membership list. But he was not so directed. On the contrary, he was told that he need not produce the membership list then and there, but should produce it within ten days. In effect the order contained in the subpoena was vacated, and a new order substituted. Since there was no direction to produce the membership list at the hearing, petitioner could not validly be held guilty of committing a contempt on the day of the hearing.

ARGUMENT

I. THE CONVICTION MUST BE REVERSED BECAUSE THERE WAS NO SHOWING OF THE SUBJECT OF THE INQUIRY, OF THE PERTINENCY OF THE DOCUMENTS DEMANDED, OR OF A LEGISLATIVE PURPOSE FOR THE DEMAND

A. The Prosecution Did Not Carry the Burden of Proving These Essential Elements

A conviction for contempt of a Congressional committee may be sustained only if:

(1) The questions asked or documents subpoenaed are pertinent to the matter under inquiry by the committee conducting the investigation. *Quinn* v. *United States*, 349 U.S. 155, 161; *United States* v. *Rumely*, 345 U.S. 41; *Sinclair* v. *United States*, 279 U.S. 263; *McGrain* v. *Daugherty*, 273 U.S. 135.

(2) The inquiry serves a valid legislative purpose, which the witness' recalcitrance has frustrated. As stated in *Watkins* v. *United States*, 354 U.S. 178: "There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . No inquiry is an end in itself; it must be related to and in furtherance of a legitimate task of the Congress." (At 187.) And, "an investigation into individual affairs is invalid if unrelated to any legislative purpose." (At 198.) *Jurney* v. *MacCracken*, 294 U.S. 125, 148, earlier established that a refusal to furnish information to a Congressional committee is punishable only if it "obstructs the performance of the duties of the legislature." Cf. *Marshall* v. *Gordon*, 243 U.S. 521.

(3) The "congressional need for the particular information" must be balanced against, and must outweigh, "the individual and personal interest in

privacy." "The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness. We cannot simply assume, however, that every congressional investigation is justified by a public need that over-balances any private rights affected." (*Watkins* at 198.)

These essential elements may not be presumed or conjectured. The prosecution must prove pertinency and legislative purpose. *Sinclair* v. *United States, supra,* at 296, 297; *United States* v. *Rumely, supra; Watkins* v. *United States, supra; Bowers* v. *United States,* 202 F. 2d 447.

In the present case the record does not even indicate the subject which was under inquiry by the Subcommittee. Still less does it show the pertinency of the specified records demanded to the unidentified subject under inquiry. Nor was there any evidence indicating the Subcommittee's need for the list of Union members or the intended use of the list. Hence there is no showing of any legislative purpose for the information demanded and refused.

The transcript of the hearing before the Subcommittee contains nothing which indicates the subject under inquiry, the pertinency of the records demanded, or the legislative purpose for the demand. On the contrary, the single Senator who presided never contradicted the repeated assertion made by petitioner at the hearing (R. 41, 42, 47, 48, 49, 50) that production of the membership list would serve no valid or useful purpose and would be utilized for the non-legislative purpose of blacklisting. (Cf. *Watkins,* at 200, "We have

no doubt that there is no congressional power to expose for the sake of exposure," and at 187, "Nor is the Congress a law enforcement or trial agency.") Further, as we have seen, the issuance of the subpoena was not preceded by a considered judgment of the Subcommittee that the information demanded was necessary or even useful for legislative business. It was perfunctorily signed by the chairman of the Committee and even named the wrong organization. (See *supra*, p. 6).

Other than the transcript of the hearing, the only evidence introduced at the trial was the testimony of counsel for the Subcommittee that the Subcommittee had in its files information that some of the Union's officers and executive board members were members of the Communist Party. But this circumstance without more does not by any rational process demonstrate what was the subject under inquiry, the pertinency of the list, or the purpose for which the list was sought.

In contrast to the vacuity of the government's proof is the unprecedented and sweeping nature of the subpoena. Never before has a labor union officer been convicted for refusing to produce to a Congressional committee the membership lists of his union. Never before, so far as we have been able to ascertain, has a committee made such a sweeping demand. The Subcommittee's unprecedented subpoena, insisted upon by a single Senator, sought to invade the privacy of the 35,000 individuals who were members of the Union. These were to be stigmatized by being listed in the archives of a committee operating in the area of internal security, and would thereafter be ever subject to public defamation at some crucial point in their

affairs.[3] As stated in *Watkins*, at 197, "Those who are identified by witnesses and thereby placed in the same glare of publicity are equally subject to public stigma, scorn and obloquy." The Subcommittee's subpoena also infringed the hard-won tradition of the American labor movement that labor unions should not be required to divulge the names of their members.

In *Watkins*, the Court set aside for lack of a legislative purpose an attempted invasion of the privacy of a few former members of the Communist Party, whom the witness had refused to name. The attempted invasion of privacy here makes that involved in *Watkins* pale into insignificance.

Because there was not introduced any evidence of the subject under inquiry, pertinency, or legislative purpose, the trial court erred in denying petitioner's motion for a judgment of acquittal (R. 77-8, 20-1) and the court below erred in affirming the conviction.

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[3] Jacob K. Javits, then Attorney General of New York, discovered on the eve of his nomination as a Republican candidate for the United States Senate, that he was being attacked as a security risk on the basis of testimony which had been received by this same Subcommittee. Senator Javits was eventually accorded the privilege of testifying before the Subcommittee in order to clear himself. See 1956 Cong. Quarterly Almanac, pp. 732-3; N. Y. Times, Sept. 4, 7 and 10, 1956. On April 4, 1957, E. Herbert Norman, Canadian Ambassador to Egypt, committed suicide following this Subcommittee's release of derogatory information it had received concerning him in closed hearings—Mr. Norman having been previously cleared of the accusations by his own government. The Canadian government sent a formal protest to this government, and the Department of State expressed its condolences and regrets. N. Y. Times, April 5, 11 and 13, 1957.

B. The Invalidity of the Subpoena Is Aggravated by the Demand for the Names of State, County and Municipal Employees

The indictment (R. 2-3) made two counts out of a single subpoena which demanded not only the names and addresses of Union members employed by the federal government, but also the "names and addresses of all members who are employed by any state, county or municipal government located anywhere within the United States of America" (R. 63). As we have seen, ninety-five percent of the names demanded were in this latter category.

Insofar as the subpoena demanded the names and addresses of employees of state and local governments, it was, as we later show, at least prima facie beyond the jurisdiction of the Subcommittee and of Congress itself. Since this presumption was never rebutted by evidence, this demand was invalid. Accordingly, the conviction on both counts must fall, even if the demand for the names of Union members who were federal employees were valid, since a conviction cannot stand for disobedience of a partially invalid subpoena. In *Bowman Dairy Co.* v. *United States,* 341 U.S. 214, a witness had been subpoenaed to produce three sets of records, listed separately in the subpoena in paragraphs lettered (a), (b) and (c). The witness failed to produce any of the records and was held in contempt. The Court held that the witness was required to produce the items listed in paragraphs (a) and (b), but not in (c). Nevertheless, the Court reversed the contempt conviction on the ground that since part of the subpoena was bad the witness could not be punished for refusing to comply with the parts that were good. The Court stated (at 221):

> "One should not be held in contempt under a subpoena that is part good and part bad. The burden is on the court to see that the subpoena is good in its entirety and it is not upon the person who faces punishment to cull the good from the bad."

This same principle was applied to a congresssional subpoena in *United States* v. *Patterson,* 206 F. 2d 433.

The investigative power of Congress is, of course, ancillary to its legislative powers and cannot be employed in fields within which Congress may not legislate. *Kilbourn* v. *Thompson,* 103 U.S. 168; *Quinn* v. *United States, supra; Watkins* v. *United States, supra, McGrain* v. *Daugherty, supra; Re Chapman,* 166 U.S. 661; *Barry* v. *United States,* 279 U.S. 597. In this case, the Subcommittee asserted power to inquire into the organizational affiliations of state and local government employees. This was not a field within which Congress could legislate, being within the reserved powers of the states, and therefore the inquiry was ultra vires. This is particularly true because the inquiry was obviously of a kind which was an interference with government-employee relations, and not merely an innocuous gathering of information for legislative use.

Surely if there is anything within the reserved power of the states, it is control of state and local government personnel. The qualifications and affiliations of such employees are matters of internal state administration over which the federal government has no control, and into which therefore it cannot inquire. So the Court has said:

> "The legislative power of a State, except so far as restrained by its own Constitution, is at all times absolute with respect to all offices within its reach.

It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service. And it may increase or diminish the salary or change the mode of compensation." (*Newton* v. *Mahoning County,* 10 Otto (100 U.S.) 548, 549.)

"And we think it clear that the Federal Government, under the Constitution, has no power to impose on a state officer, as such any duty whatever, and compel him to perform it . . ." (*Ex Parte Kentucky* v. *Dennison,* 24 How. (65 U.S.) 66, 107.)

"In its internal administration the state (so far as concerns the Federal government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the person filling the office." (*Wilson* v. *North Carolina,* 169 U.S. 586, 594.)

Even if one could conceive circumstances in which it would be of legitimate federal concern to ascertain the union affiliations of certain state and local government employees, no such circumstances were shown here. Nor would it be appropriate to advance speculative grounds for federal interest in state employment. Since state employment is peculiarly a matter of state concern and internal administration, Congress cannot intervene in state employment matters unless there is a clear showing of federal interest. This Court has recognized that it is "a principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the Federal power must clearly appear." *Florida* v. *United States,* 282 U.S. 194, 211-2. See also *Linder* v. *United States,* 268 U.S. 5, 17.

The fact is that the Subcommittee had no more business inquiring into the union affiliations or political

attitudes of, say, the garbage collectors of Akron, than it had to investigate the "loyalty" of a member of the Canadian diplomatic service. It is significant that at the Subcommittee hearing, Senator Watkins, the only member present, himself seems to have recognized that the Subcommittee had no legitimate interest in the demand for the names of state and local government employees. Thus the following colloquy occurred at the hearing (R. 48-9):

> "Senator Watkins: I would not argue with you for employees outside of the Government service, or state, county and municipal service. I am not going to argue that question because it is not at issue here. But we have here now an organization made up of people who are working for Government and we are asking you specifically for the names of those who are working for the Government.[4] You have that within your information and *I do not think there is any law or any court holding that the United States itself cannot find out the names of a union and the people who belong to it that are in its employ.*
>
> Mr. Flaxer: Sir, I don't think the issue has ever come up before.
>
> Senator Watkins: *Maybe it has not, but I do not think any court would ever resolve itself against the United States finding out what organization its members belong to.*" (R. 48-9, emphasis supplied.)

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[4] Earlier in the hearing, Arens, counsel for the Subcommittee, had said (R. 45): "Do you have membership in almost all of the Government agencies? By 'Government' I mean the Federal Government agencies."

C. The Justifications of the Subpoena by the Court Below Are Unfounded and Unconstitutional

In upholding the validity of the Subcommittee's demands, the court below departed from all standard principles governing prosecutions for contempt of Congress. In the face of a record which, as we have seen, was barren of evidence as to the subject under inquiry, the pertinency of the lists demanded, and legislative purpose, the court conjectured these necessary elements. Its conjectures were not only unfounded, but were also unconstitutional bases for the Subcommittee's inquiry.

Originally, the majority below, in an opinion by Judge Miller, held (R. 103-4) that the Subcommittee's inquiry was justified under the third clause of the Subcommittee's enabling resolution, that authorizing it to study and investigate the "extent, nature and effects of subversive activities in the United States . . . including but not limited to espionage, sabotage and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world communist movement or any other movement seeking to overthrow the Government of the United States by force or violence" (*supra*, pp. 2-3).

Following the remand, the prevailing opinion by Judge Prettyman held (R. 117):

> "As we pointed out upon remand in *Sacher*, the Senate resolution here involved is more precise than the House resolution criticized in *Watkins*. *A fortiori* this resolution was not struck down by the Court in its *Watkins* opinion."

This reliance upon the court's earlier decision in *Sacher* v. *United States*, 252 F. 2d 828, reversed on

petition for certiorari, 356 U.S. 576, represented a shift in the court's theory of the Subcommittee's authority for the inquiry in this case. For in *Sacher* the court below had held that the Senate resolution was sufficiently precise solely with respect to the first two clauses of the resolution.[5] See 252 F. 2d at 831-2. Although the court below did not explain, or even expressly acknowledge, this change of theory, it is significant that the intervening decision of this Court in *Watkins* had obviously imperilled the validity of the third clause of the Subcommittee's charter, which suffers from the same vagueness which, *Watkins* held, afflicted the charter of the House Committee on Un-American Activities. In any event, the ability of the court below to supply first one basis and then another for the Subcommittee's inquiry furnishes another demonstration that the Subcommittee's demands had no defined legislative purpose.

Judge Miller's opinion accommodated itself to the third clause of the authorizing resolution by holding that the Subcommittee was investigating Communist infiltration of the Union (R. 97), and that against the "background" of this clause and anti-Communist legislation, "the pertinency of the membership list demanded by the subpoena is at once apparent. . . . The names could be used to check against a list of subversives to determine the extent of infiltration

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[5] Those authorizing the investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950, and (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States. *Supra*, p. 2.

into the union, a matter clearly pertinent under the Resolution, particularly since this is a Government employees' union, even though the names of state and local members are included" (R. 104).

The first objection to this theory is that it is an improvisation of the facts. There is no evidence that (1) the subject of the inquiry was infiltration of the Union, or (2) that the purpose of the demand was to check the names of Union members against a master list of "subversives," or (3) that the Subcommittee had such a master list, or (4) what legislative use would be made of the checked-off list.

If a legislative purpose, no matter how fantastic, may be conjectured by the appellate court for any demand, no matter how extravagant, the principle that Congressional investigations must have a legislative purpose becomes merely a paper requirement. Yet this has now occurred for the jurisdiction in which most Congressional investigations are held and in a period when abuse of the inquiry power is most prevalent. See Barth, *Government by Investigation* (1955); Taylor, *Grand Inquest* (1955), especially c. IV; Chafee, *The Blessings of Liberty* (1956) p. 221; *United States* v. *Rumely, supra,* at 44; *Watkins* v. *United States, supra,* at 195.

The second objection to the court's theory is that it is hard to imagine a more illegal purpose than that conjectured. Surely it is not a legislative function for the Congress to occupy itself with compiling political dossiers of individuals, including persons not employed by the federal government, and to maintain lists of "subversives."

Judge Miller's opinion did not suggest in what manner the checking of names against a "list of subversives" could possibly assist Congress in its legislative work. The demand for a wholesale list of names, in the absence of any showing of a legitimate legislative purpose, was not only ultra vires, but was also a violation of the First, Fourth and Fifth Amendments. Cf. *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449. See also *Federal Trade Commission* v. *American Tobacco Company,* 246 U.S. 298; *Jones* v. *S. E. C.,* 298 U.S. 1. The issue here is not one of the power of Congress to investigate but rather whether Congress has power to investigate without limit or cause. As this Court said in the *Sinclair* case, *supra,* at p. 292:

> "It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs."

To the same effect, Mr. Justice Brandeis stated in his dissent in *Olmstead* v. *United States,* 277 U.S. 438, 478:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right,

every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the 4th Amendment."

If the decision below is allowed to stand, the Subcommittee will have the power to subpoena, for irresponsible reasons or no reason, the names and addresses of the one and a half million members of the Teamsters Union, of the million members of the United Automoble Workers, and, for that matter, of almost any organization. For it can always be speculated, as did the court below in this case, that the Subcommittee desires to check the names of the organization's members against a supposed master list of "subversives." Similarly, the Subcommittee could demand, under the slogan of investigating security and without further showing, the names of all employees of and subscribers to the New York Times.[6]

In this case, it is true, the Subcommittee had derogatory information about some of the organization's leaders. But if such a foundation is necessary, it is, under current conditions, child's play to supply it, particularly for a Subcommittee which can develop derogatory security information about a Republican Attorney General of New York, a Canadian ambassador to Egypt, and the New York Times.

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[6] In 1955 and 1956, one of the Subcommittee's major investigations consisted of searching for "subversives" on the staff of the New York Times, an undertaking commonly understood to be not unconnected with that newspaper's stand in favor of school integration in the South. See 1956 Cong. Quarterly Almanac, p. 732; 1957 Annual Report of the Subcommittee, pp. 97, 100, 103-6; N. Y. Times editorial, Jan. 5, 1956; N. Y. Times, Jan. 5, 1956 and Apr. 20, 1956; Wash. Post & Times-Herald, Jan. 5, 7 and 10, 1956, Apr. 24, 1956; *United States* v. *Peck*, 154 F. Supp. 603.

Judge Prettyman's opinion, as we have seen, abandoned the original majority view that the Subcommittee was operating under clause three of its enabling resolution. This inevitably made irrelevant the supposition that the Subcommittee was investigating Union infiltration, a subject which was supposedly pertinent to the third clause of the resolution. However, despite the emphasis in *Watkins* on the need to ascertain the subject under inquiry, Judge Prettyman did not advance any new theory of the subject of the inquiry or pertinency. Instead, without referring to the earlier theory and without advancing one of his own, he simply asserted that the petitioner knew what the unidentified subject was (R. 117).

As we later show (*infra*, p. 34), there is no basis for the finding that petitioner knew the subject under inquiry. But even if petitioner had such knowledge, this would not relieve the court below of its obligation to determine and state what that subject was, whether the demand of the Subcommittee was pertinent to it, and whether it served a legitimate legislative purpose. *Watkins* also recognized (at 198-9) that the Constitution places upon the judiciary the responsibility of performing the "arduous and delicate task" of accommodating "the congressional need for particular information with the individual and personal interest in privacy," so as "to ensure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly." Although this case was remanded to the court below for consideration in the light of *Watkins*, it is clear that the court did not discharge this responsibility.

II. THE CONVICTION MUST BE SET ASIDE BECAUSE PETITIONER WAS NOT INFORMED OF THE PERTINENCY OF THE RECORDS DEMANDED

Watkins held as a requirement of due process that a witness before a congressional committee "is entitled to have knowledge of the subject to which the interrogation is deemed pertinent" (at 208-9), and that, "Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto. To be meaningful, the explanation must describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it." (At 214-5.) This holding of the Court was summarized as follows by Mr. Justice Frankfurter in his concurring opinion (at 217):

> "The questions must be put with relevance and definiteness sufficient to enable the witness to know whether his refusal to answer may lead to conviction for criminal contempt and to enable both the trial and the appellate courts readily to determine whether the particular circumstances justify a finding of guilt.
>
> ". . . Prosecution for contempt of Congress presupposes an adequate opportunity for the defendant to have awareness of the pertinency of the information that he has denied to Congress. And the basis of such awareness must be contemporaneous with the witness' refusal to answer and not at the trial for it. Accordingly, the actual scope of the inquiry that the Committee was authorized to conduct and the relevance of the questions to that inquiry must be shown to have been luminous at

the time when asked and not left, at best, in cloudiness."

In the present case, there was no statement at the hearing as to the subject under inquiry or the specific legislative need for the names and addresses of the 35,000 members of petitioner's Union. Accordingly, the petitioner was not, as required by *Watkins,* informed either of the subject under inquiry or of the specific legislative need for the list of Union members.

On the remand, the prevailing opinion below avoided this problem by holding (R. 117):

> "Even if the resolution is vague, Flaxer's responses to questions demonstrated that he knew what the subject of the inquiry was. In response to the *subpoena* he produced the financial and various other records of his union and, without objecting, presented them to the Committee on the record. He thus indicated that he recognized the nature of the question under inquiry."

This has no semblance of logic. The fact that petitioner answered some of the Subcommittee's questions, as did Watkins, and produced the financial records merely shows that he was willing to provide this information whether or not the Subcommittee had a right to demand it. Acquiescing to some demands of the Subcommittee, especially with personal liberty at stake, could not demonstrate awareness of the question under inquiry in connection with those or other demands; nor did petitioner's production of some records in any way reveal knowledge of the subject under inquiry or the pertinency of the produced or withheld records. Nor, finally, would knowledge of the unidenti-

fied subject under inquiry, if it existed, supply knowledge of the pertinency of the records demanded.

As a second ground for holding that petitioner was not entitled to an explanation of the pertinency of the membership list, the prevailing opinion on the remand asserted that petitioner had not objected on the ground of lack of pertinency (R. 117-8). This is a misreading both of *Watkins*[1] and of the record.

Petitioner objected to the demand for the membership list as constituting a "wholesale invasion . . . of privacy" violative of the Fourth Amendment (R. 42). On two occasions he stated his belief that the membership list was being demanded for the purpose of compiling a blacklist to destroy the Union (R. 41, 49). He also stated that the demand was an "improper command" (R. 47), and he was cut off in the midst of an objection that the Subcommittee "was infringing here on an area which just crosses the boundaries of individual rights as well as trade union rights far beyond the contemplation of any—" by the chairman's state-

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[1] See *United States* v. *Peck*, 154 F. Supp. 603, 611: "The government contends, however, that even though a Committee is acting under a resolution which does not sufficiently define its authority, and even though a witness cannot determine the subject under inquiry, he has been afforded due process of law unless he objects to the questions asked on the specific grounds of 'pertinency.' This Court does not so narrowly construe *Watkins*, nor does it consider that such a construction is in any way consistent with the spirit of that ruling. Rather the court believes that Watkins requires strict compliance by the Congress with procedural requirements of definiteness of authority and subject matter whenever First Amendment rights of a witness are involved."

ment that, "Whatever your argument is," his objection would be overruled. (R. 50). The one-man chairman of the Subcommittee did not contradict the petitioner's assertions, nor did he state the subject of the inquiry or the pertinency of the records. Instead, he merely called attention to the fact that "for the present the records are to be delivered to the committee in executive session" (R. 49). Petitioner responded: "Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public" (R. 50).

Thus petitioner's position was clear: If the records were to be made public, they would be used for an improper and impertinent purpose—blacklisting. If they were to be kept private, they would be "wholly irrelevant" even to the illegitimate purpose of blacklisting. Under any circumstances, the records could serve no valid purpose.

Petitioner, therefore, did challenge the pertinency and legislative purpose of the Subcommittee's demand. Since the Subcommittee did not then state the subject under inquiry and the manner in which the documents were pertinent thereto, *Watkins* requires that the conviction be reversed. Judge Prettyman's opinion on this point is simply blind to the facts of record. The opinion recognizes that petitioner objected that the documents would be irrelevant if they were not made public, from which it concludes that the petitioner's objection was to the documents being kept private! It fails to perceive that petitioner, by objecting that the Subcommittee wished to promulgate a public black-

list, was thereby objecting on grounds of lack of pertinency and legislative purpose if the lists were published. And it attaches no significance at all to petitioner's unequivocal statement that he did not see "any good purpose that these records would serve" if he were to produce them. Finally, it ignores entirely petitioner's repeated assertions that the demand was an unjustified invasion of privacy and a violation of Constitutional rights. These claims by themselves obviously include contentions of lack of pertinency, since their resolution involves balancing the need and usefulness (i.e., the pertinency) of the records against the interest in privacy, and since blacklisting is not a proper legislative or Subcommittee function (*Watkins*, at 187, 200). As the court said in *United States* v. *Peck*, *supra*, at 611:

> "In any event the Court finds that Peck did object to the lack of pertinency of the questions. Although he did not use the word 'pertinency', he informed the Subcommittee that he did not believe that it possessed the authority to ask the particular questions involved. In so doing he also specifically put the Subcommittee on notice that his complaint related to the invasion of his First Amendment rights. Justification for such an invasion may be found only in cases in which the Subcommittee's authority is clearly defined, a clear question under inquiry is established, and a question pertinent thereto is asked. Yet the Subcommittee made no effort to explain its asserted right to engage in such an invasion. Surely Peck's objection was sufficient, for where constitutional rights are involved, courts must liberally interpret objections of witnesses. They cannot impose a standard of technicality or insist upon a rigid verbal formula which serves only to defeat the

basic constitutional liberties they should strive to preserve."

It would have been too late to remedy these deficiencies at trial. It is illuminating, however, that a showing of relevancy and legislative need was not even belatedly made. At trial, the government presented no evidence at all on the subjects. Nor, as we have shown, did the purpose of the demand as conjectured by the court below in its original opinion constitute such a showing.[8] On the remand, the court below stated that petitioner knew the subject under inquiry, but the opinion significantly did not state what that was. The language of *Watkins* (at 214) aptly describes the present case: ". . . we remain unenlightened as to the subject to which the questions asked petitioner were pertinent. Certainly, if the point is that obscure after trial and appeal, it was not adequately revealed to petitioner when he had to decide at his peril whether or not to answer."

III. THE RESOLUTION ESTABLISHING THE SENATE SUBCOMMITTEE ON INTERNAL SECURITY IS TOO VAGUE TO SUPPORT A CONVICTION FOR CONTEMPT

Watkins held that a witness cannot be adjudged guilty of contempt for refusing to answer questions of a congressional investigating committee chartered by a vague resolution. *Watkins* emphasizes that this rule has special force where a committee inquiry infringes upon freedoms protected by the Bill of Rights. Applying this principle, *Watkins* held that the resolution establishing the House Committee on Un-American Activities was too broad and nebulous to support committee use of compulsory process.

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[8] The trial court found that the membership list was pertinent (R. 18, 89), but never stated the subject under inquiry.

The key passages in *Watkins* on the subject of vagueness are the following:

"An essential premise in this situation is that the House or Senate shall have instructed the committee members on what they are to do with the power delegated to them. It is the responsibility of the Congress, in the first instance, to insure that compulsory process is used only in furtherance of a legislative purpose. That requires that the instructions to an investigating committee spell out that group's jurisdiction and purpose with sufficient particularity." (At 201.)

"Combining the language of the resolution with the construction it has been given, it is evident that the preliminary control of the committee exercised by the House of Representatives is slight or nonexistent. No one could reasonably deduce from the charter the kind of investigation the Committee was directed to make." (At 204.)

"Yet it is impossible in this circumstance, with constitutional freedoms in jeopardy, to declare that the Committee has ranged beyond the area committed to it by its parent assembly because the boundaries are so nebulous." (At 205.)

"Protected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need." (At 205.)

"An excessively broad charter, like that of the House Un-American Activities Committee, places the courts in an untenable position if they are to strike a balance between the public need for a particular interrogation and the right of citizens to carry on their affairs free from unnecessary governmental interference. It is impossible in such a situation to ascertain whether any legislative

purpose justifies the disclosures sought and, if so, the importance of that information to the Congress in furtherance of its legislative function. The reason no court can make this critical judgment is that the House of Representatives itself has never made it." (At 205-6.)

This first principle of *Watkins* was summarized in Justice Frankfurter's concurring opinion as follows:

"To turn to the immediate problem before us, the scope of inquiry that a committee is authorized to pursue must be defined with sufficiently unambiguous clarity to safeguard a witness from the hazards of vagueness in the enforcement of the criminal process against which the Due Process Clause protects." (At 217.)

The resolution here involved (*supra*, pp. 2-3) is in three clauses. In our view, all three are too vague to support use of compulsory process within the standards of *Watkins*. For present purposes, however, it is necessary to consider only the third, that authorizing the investigation of "the extent, nature and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence." This limited consideration is appropriate because (1) the vagueness of the third clause is most obvious, (2) the only subject of the inquiry supposed below (in Judge Miller's opinion) was justified under this clause, and (3) in fact it is on this record impossible to tell which clause the Subcommit-

tee was acting under, if any, from which it follows that the subpoena is vulnerable if any one of the authorizations to which it might relate is insufficient to support it.

The key term of the third clause is "subversive activities." This is obviously no more susceptible to intelligible definition than "subversive and un-American propaganda," which *Watkins* held to be a fatally vague charter for the Un-American Activities Committee. In *Watkins*, moreover, the Court expressly stated (at 214): "The Chairman then announced that the Subcommittee was investigating 'subversion and subversive propaganda.' This is a subject at least as broad and indefinite as the authorizing resolution of the Committee, if not more so."

The conclusive demonstration of the vagueness of the authorizing resolution of the Internal Security Subcommittee appears in Judge Youngdahl's opinion in *United States* v. *Peck, supra*, at 608-10, as follows:

> "It seems manifest that the vices to be found in the House Un-American Activities Committee's authorizing resolution are equally present in the charter of the Senate Internal Security Subcommittee. The Senate resolution is composed of three sections, two of which relate to the study of internal security laws. The third section, however, purports to grant the authority to investigate 'subversive activities'. The Supreme Court has clearly indicated that such a grant of authority must fail for want of definiteness. In *Watkins* the Court noted that the Chairman of the Un-American Activities Committee had announced that the scope of the investigation was 'subversion and subversive propaganda'. The Court then said, 'This is a subject at least as broad and indefinite as the resolution of the Committee, if not more so.'

"In its resolution, the Senate did not undertake the troublesome task of defining 'subversive activities'. . . . . no indication is given as to what else is deemed 'subversive', nor is the Court aware of a satisfactory definition. What may be a fit subject for investigation one day may be tomorrow's sacred cow. What is the height of orthodoxy today may be viewed as 'un-American' tomorrow. Nor is there any individual who can be certain that he is not considered 'subversive' by some of his fellow citizens. Who is to say, for example, whether one who is openly dedicated to depriving his neighbors of their 14th Amendment rights under the Federal Constitution is a 'subversive'? The dangers of classifying certain forms of belief or political activity as 'subversive' are all too apparent from the recent history of this country. It is too easy for one segment of public opinion to smear with that label those who hold opinions which are unpopular. Such labeling by means of legislative investigations constitutes a drastic form of Government sanction. When that labeling is done in the manner utilized by the Senate Internal Security Subcommittee it becomes intolerable. Democracy deals with unpopular views by offering better ideas and programs, not by outlawing those views or penalizing their adherents.

"The resolution cannot be saved by reference to the first two sections, which concern investigations of the Internal Security Act and laws relating to espionage and sabotage. Nor can it be saved by construing the third section to include only such 'subversive activities' as are comprehended within the 'including but not limited to' clause. For the history of the Subcommittee's investigations shows that it conceived its mission to be the broad task of rooting out 'subversives' or Communists wherever it found them. The Subcommittee made no effort to distinguish among the several sections of its authorizing resolution in conducting its investigations, and thus the resolution must be evaluated

as a whole. The Court must view it in the light of the Subcommittee's understanding of its mandate—to root out subversion. A comparison of the Subcommittee's reports with those of the Un-American Activities Committee demonstrates an identity of understanding as to the sweeping mission to be accomplished. Each conceived of itself as the nation's watchdog. Each thought that it was capable of determining what was 'Un-American', what was 'subversive'. Each failed to distinguish between innocent associations with groups which were legitimate at the time of membership and knowing adherence to a criminal conspiracy. Neither restricted its inquiries to acts of espionage, sabotage, or infiltration—whatever the latter means—by persons dedicated to overthrowing the government by force. The Supreme Court has held that such a manifestation of authority renders an authorizing resolution, so questionable in its terms, vague or defective."

IV. PETITIONER WAS ENTITLED TO A JUDGMENT OF ACQUITTAL BECAUSE HIS OBJECTIONS TO THE VALIDITY OF THE SUBPOENA WERE NOT OVERRULED BY A QUORUM OF THE SUBCOMMITTEE

Quinn v. *United States*, 349 U.S. 155, and *Bart* v. *United States*, 349 U.S. 219, established that a witness who has objected to a committee's demands may not be convicted of contempt unless his objections have been overruled by the committee. In the present case, petitioner's objections to producing the membership list of the Union were overruled by a single member of the seven-man Subcommittee on Internal Security (R. 34), who was the only Senator present at the hearing. This Senator also overruled petitioner's objection to the absence of a quorum (R. 38-9).

Under the Senate Rules and the Subcommittee's enabling resolution, one Senator was not a quorum for

the purpose of ruling on petitioner's objections. Therefore, petitioner's objections were never overruled by an authorized tribunal, and he cannot be held guilty of contempt.

Section 2 of Senate Resolution 366 (*supra*, p. 3), which is the charter of the Subcommittee, provides that a majority of the members of the Subcommittee "shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the committee, or by such subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony." Senate Rule XXV(3) (*supra*, pp. 3-4) provides that each standing committee and subcommittee "is authorized to fix the number of its members (but not less than one third of its entire membership) who shall constitute a quorum thereof for the transaction of such business as may be considered by said committee"; also each standing committee and subcommittee "is authorized to fix a lesser number than one third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony." In January 1951, the Subcommittee took advantage of the permissive provisions for testimonial quorums by passing a resolution that one member of the Subcommittee would constitute a quorum for the purpose of taking testimony (R. 34).

Under the Senate Rules and Senate Resolution 366, therefore, the authority of Senator Watkins, who presided at the hearing as the single Senator present, was limited to taking sworn testimony. The transaction of any other business required a majority of the seven-man Subcommittee.

It is clear, we submit, that Senator Watkins was not a quorum for the purpose of ruling on petitioner's ob-

jections to the subpoena, since such a ruling was not the taking of sworn testimony and constituted the transaction of other business, for which one Senator could not be a quorum.

The authorization to take "sworn testimony" by its terms precludes authority to deal with documents. The word "testimony" means, when accurately defined, *oral* statements under oath, and does not include documents. Thus Black's *Law Dictionary* (3rd ed., 1933) defines "testimony" as follows: "Evidence given by a competent witness, under oath or affirmation; as distinguished from evidence derived from writings, and other sources" (citing numerous cases, including *Edelstein* v. *United States,* 149 F. 636, 640). To like effect: Ballentine, *Law Dictionary,* (3rd ed., 1948); Bouvier's *Law Dictionary* (Rawle's 3rd Rev., 1914).

Accordingly, "testimony" when used in statutes is generally construed to exclude documents, unless there is compelling reason to the contrary to effectuate the legislative intent or the statutory purpose. E.g., *Brett* v. *Dean,* 239 Ala. 675, 196 So. 881; *Stern* v. *Superior Court,* 78 Cal. App. 2d 9, 177 P. 2d 308, 310; *Re Seigle's Estate,* 264 N.Y. App. Div. 76, 34 N.Y. Supp. 2d 489, 491; *Barley* v. *Dunn,* 85 Ind. 338, 339; *Weeks* v. *Bailey,* 33 N.M. 193, 196, 263 Pac. 29, 30.

The reference in the Resolution and Senate Rule is not to "testimony" alone, but to "sworn testimony." This clearly must mean oral evidence. Surely the documents which appellant was subpoenaed to produce were not, and were not supposed to be, sworn papers.

The text of the Resolution and Rule, therefore, does not authorize one Senator even to *receive* documentary evidence, much less to rule on objections to their pro-

duction. And there are good reasons, even aside from the legislative history of Senate Resolution 180, to which we later refer, why the text should not be expanded beyond its plain meaning.

In the first place, the provision authorizing a one-man quorum is stated as an exception to the general rule of what constitutes a quorum. It is a settled principle that exceptions will be construed strictly, since otherwise the exception can nullify the general rule. See Mr. Justice Holmes' statement in *Schlemmer* v. *Buffalo, R. & P.R. Co.*, 205 U.S. 1, 10; also *Piedmont & Northern Ry. Co.* v. *I.C.C.*, 286 U.S. 299, 311-2; *United States* v. *Dickson*, 15 Pet. 141, 165; *United States* v. *Scharton*, 286 U.S. 518, 521-2. Since the Internal Security Subcommittee is strictly an investigating committee (Sen. Res. 366, 81st Cong., 2d Sess.), an expansion of the exception would really swallow the rule.

Secondly, a strict construction of the exception does not frustrate the exercise of Congressional power. For the documents can always be received, and objections to their production ruled on, by a genuine quorum.

Thirdly, in the light of the vast public criticism of one-man subcommittees, it would be unreasonable to assume that the Senate intended its authorization of one-man subcommittees to be extended beyond its precise terms.

Fourthly, the fact that the Senate was willing to have one Senator take testimony does not by any means imply that the Senate was willing to have one Senator rule on objections to the production of documents. Documents can have value only insofar as they represent evidence not obtainable by oral testimony. More-

over control over papers and records is a touchy matter. The documents may not be the witness' property and their production may invade the privacy of many people. Such was precisely the situation in this case. And demands for the production of documents, unlike demands for oral testimony, can raise Fourth Amendment problems and can seriously interfere with the business of an organization of many persons.

Finally, Senator Watkins could have the power to rule on petitioner's objections only if he had the power to rule both ways. It cannot be suggested that he had authority to overrule the objections, but did not have authority to grant them. Otherwise, indeed, there would be no force in the principle that a witness is entitled to have his objections ruled on by the tribunal.

It is clear, however, that Senator Watkins did not have the authority to grant petitioner's objections. If he had done so, he would have vacated the subpoena pro tanto. The subpoena, however, was a Committee action, issued not by Senator Watkins, but by the Committee chairman (R. 53, 63), who was authorized to act for the Committee in issuing the subpoena. Sen. Res. 366, 81st Cong., 2d Sess. Vacation of the subpoena, in whole or part, would clearly not be the 'taking of testimony," but the transaction of other business. Nor should a single Senator be able to eliminate by his own ruling an action taken by the chairman on behalf of the Committee as a whole. Such a step obviously required a full quorum of the Committee, and not merely a quorum for testimonial purposes.

Our analysis is corroborated by the legislative history of the revision of Senate Rule XXV(3), which shows that the exception for a testimonial quorum of

less than one-third was adopted for a special, limited purpose which has no application under the present circumstances, and that it was not intended to apply beyond its precise and narrow terms.

Prior to the adoption of Senate Resolution 180, 81st Cong., 2d Sess., the Senate rule on quorum, contained in subsection (3) of rule XXV of the Standing Rules of the Senate, did not contain the exception for testimonial quorums, but merely provided as follows:

> "(3) Each standing committee is authorized to fix the number of its members (but not less than one-third of its entire membership) who shall constitute a quorum thereof for the transaction of such business as may be considered by said Committee, subject to the provisions of section 133(d) of the Legislative Reorganization Act of 1946." (Quoted in Sen. Rep. 1208, 81st Cong., 2d Sess., p. 1).

Senate Resolution 180, which amended this provision to its present text so as to permit smaller testimonial quorums, was reported favorably by the Senate Committee on Rules and Administration. The report of that Committee (Sen. Rep. 1208, 81st Cong., 2d Sess.) fully explains the purpose of the change made by Resolution 180, as follows (p. 1, emphasis supplied):

> "In *Christoffel* v. *United States*, ((1949) 338 U.S. 84), the Supreme Court invalidated the practice or custom of presuming a quorum of a committee to be present once it had been established, and until a point of 'no quorum' was made, insofar as the existence of a quorum is necessary to establish a competent tribunal for taking sworn testimony.
>
> "Adoption of Senate Resolution 180 is intended to meet the problems raised by the Supreme

Court's decision, by authorizing each Senate committee and subcommittee hereafter to fix the number of its members which shall constitute a quorum *for the purpose of taking sworn testimony. The resolution does not otherwise change the existing requirements pertaining to committee quorums contained in the Senate Rules or in the Legislative Reorganization Act of 1946.*"

When the Resolution reached the Senate floor, Senator Lucas asked for an explanation of the bill. Senator Hayden, speaking for the Committee on Rules and Administration, replied as follows (96 Cong. Rec. 1284; emphasis supplied):

"Mr. Hayden (For Committee on Rules and Administration). Mr. President, this resolution is designed to take care of the question of a quorum being present in committees when sworn testimony is to be taken and perjury may be committed. *It is to prevent perjury.* The committee believes it has met the problem in the proper way. The Senator will remember there is presumed to be a quorum present. That had been the usual rule, until the Supreme Court decided otherwise. Now, for the purpose of taking sworn testimony, any committee can determine the size of the committee at a hearing, and, when it is so determined, may also determine the number required to be present. Then, if a witness gives false testimony, under such circumstances, he is guilty of perjury."

Then, replying to Senator Byrd's question as to whether the resolution had any bearing on the quorum necessary to report a bill, Senator Hayden stated (*ibid.*; emphasis supplied):

"No. The resolution merely has to do with the procedure before committees *in order to cover the question of perjured testimony.*"

It is clear, therefore, that the provision for one-man subcommittees to take sworn testimony was a response to the *Christoffel* decision; that it was intended to prevent a witness from "getting away with" perjury; that it was not designed to otherwise enlarge the authority of a number less than the usual quorum; and that, in the language of the Senate Report, quoted above, except for reducing the quorum to take sworn testimony, it "does not otherwise change the existing requirements pertaining to committee quorums." It follows that the Resolution was not intended to go beyond the perjury problem so as to authorize a one-man subcommittee to arrogate to himself the power to rule on objections to the production of documents, a matter which has nothing to do with the perjury problem which the Resolution was intended to meet.

The objections raised by the petitioner to the production of the membership list of his Union were clearly not frivolous. The issue was an important one and his views are shared by other union leaders.[9] As peti-

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[9] See, *e.g.*, the May 1952 issue of the *Catering Industry Employee*, official journal of the Hotel and Restaurant Employees and Bartenders International Union,

> "The issue is this: do unions have the right, as the courts have repeatedly held to hold their membership lists in privacy? I think they do. I hope others will join me in speaking out in defense of that right before it is too late."

The July 1952 issue of *The Carpenter*, official journal of the United Brotherhood of Carpenters and Joiners, stated in an editorial on the present case:

> "The right of privacy is something it took organized labor generations to achieve. It is something unions must maintain if the blacklist, labor spying, and all the evils of fifty years ago are not to be brought back."

Similarly a statement of policy adopted unanimously by the International Executive Board of United Packing House Workers of

tioner stated when he appeared before the Subcommittee (R. 41-42), it was then unlawful for private employers to inquire into the union membership of their employees. See 2 C.C.H., *Labor Law Reporter*, 2068 *et seq.* As we have shown above, there is no evidence at all as to what value or use these membership lists would have been to the Subcommittee in any event. It is perfectly possible that if the Subcommittee had fully considered petitioner's objections as against the relative lack of value of the membership lists, the Subcommittee might have reconsidered its demand or might have modified that demand in some way so that the issue of contempt would have been avoided. As Chief Judge Edgerton pointed out in his dissent, a full quorum "might have accepted appellant's view that the subpoena was invalid. Even if it had not accepted that view, it might have concluded that number of union members, not their names, were all that the committee needed, and might therefore as a matter of policy have withdrawn the demand for names." (R. 113).[10]

This Court "would have to be that 'blind' Court . . . that does not see what all others can see and understand not to know that there is wide concern, both in and out of Congress over some aspects of the exercise of the Congressional power of investigation." *United States*

America, CIO, at a meeting held April 22-25, 1953, stated with respect to this case as follows:

> ". . . in his recent contempt conviction for refusing to turn his union membership lists over to a Congressional investigating committee Abram Flaxer of the United Public Workers was supporting a principle on which any trade union leader would face jail rather than betray his trust."

[10] Judge Edgerton's reasoning is reinforced by the fact that the contents of the subpoena had not been considered by a full quorum of the Subcommittee prior to its issuance. See *supra*, p. 6.

v. *Rumely, supra,* at 44. Many of the abuses of the investigative power have been laid to the use of one-man subcommittees. See Barth, *Government by Investigation, supra* at pp. 203-4. And, as Judge Fahy's opinion after the remand points out (R. 118-9), *Watkins* supports the principle that the delegation of power to one-man subcommittees must be clear and precise before a witness can be required to obey a command on pain of contempt.

Here a single Senator insisted on a demand which had never before been made by a body of the Congress and which affected 35,000 individuals, and this without any statement of the purpose of the subpoena by the Subcommittee itself. When in addition to the natural concern that would be aroused by such a practice, it appears clear that the practice itself is in violation of the Senate Rules and of the rules of the Subcommittee, a defendant who is being prosecuted for contempt in violation of such rules must be granted a judgment of acquittal.

V. THE PETITIONER WAS NOT ORDERED TO PRODUCE THE RECORDS AT THE HEARING ON OCTOBER 5TH

At the hearing on October 5, 1951 there was considerable discussion between petitioner and Senator Watkins concerning the portion of the subpoena which demanded the Union's membership list. Petitioner after objecting to the validity of the subpoena, was directed by the sole Senator present to produce the list. He continued to object, asking for reconsideration of this ruling. The discussion on this matter was concluded with this final exchange:

> Mr. Arens: Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

Mr. Flaxer: I will have to take that under consideration.

Senator Watkins: That is the order, and of course, we will have to take whatever steps are necessary if at the end of the time you have not produced them. (R. 50)

The majority below held that petitioner was guilty of contempt on October 5, the date of the hearing,[11] thus making irrelevant Senator Watkins' extension of the subpoena date for production (R. 98-102). Judges Edgerton and Bazelon held that under this Court's decision in *Quinn* v. *United States, supra,* it was necessary to examine the entire proceedings, and that the issue of direction must be resolved on the basis of the final ruling made on petitioner's objections, and not on the basis of an intermediate ruling. Their dissent reasoned as follows (R. 112-3):

"In *Quinn* v. *United States,* 349 U.S. 155, 165-166, the Court said: 'Clearly not every refusal to answer a question propounded by a congressional committee subjects a witness to prosecution under § 192. Thus if he raises an objection to a certain question—for example, lack of pertinency or the privilege against self-incrimination—the committee may sustain the objection and abandon the question, even though the objection might actually be without merit. In such an instance, the witness's refusal to answer is not contumacious, for there is lacking the requisite criminal intent. . . . In short, unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under § 192 for refusal to answer that question.'

[11] The majority agreed with the petitioner's contention that under the indictment and the case as tried, the petitioner was either guilty of contempt on October 5th or not at all, and that the issue of the production or non-production of the list of names after October 5 was not in the case (R. 98-102, and see *supra,* p. 11).

The present appellant was clearly apprised that notwithstanding his objections, the Chairman demanded that he produce the records *within ten days from October 5.* He was not apprised that, notwithstanding his objections, he must produce the records on October 5. On the contrary, the Chairman made it clear that he need not produce them on that date and production within 10 days from that date would suffice. It follows that here, as in the *Quinn* case, the District Court should have directed a judgment of acquittal."

The minority view is clearly the only tenable one under the *Quinn* doctrine. A witness is not "clearly apprised that the committee demands his answer notwithstanding his objections", on the basis of a direction made in the course of a colloquy which is altered at the end of further discussion. A witness can only reasonably conclude that he should be guided by the last words of the committee and not by its earlier statements. Indeed, this Court in *Quinn* (at 166, ftn. 34) cited with approval the decision and opinion of the District Court in *United States* v. *Kamp,* 102 F. Supp. 757, in which the defendant was acquitted of contempt on the basis of a colloquy between the defendant and the committee substantially identical to that which occurred here.

CONCLUSION

The judgment below should be reversed with directions for the entry of a judgment of acquittal.

Respectfully submitted,

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